

Consultation on process for handling disputes and appeals: Requisitioning of water mains and public sewers and/or lateral drains and adoption of self-laid water mains

Summary of responses and our conclusions

1. Introduction

We published the consultation paper 'Process for handling disputes and appeals: Requisitioning of water mains and public sewers and adoption of self-laid mains' in December 2003. At the same time we consulted on the financial arrangements for self-lay and requisitioning agreements. Our consultation sought views on the process we would follow when determining disputes about the requisition of mains, sewers and lateral drains, and considering appeals about the adoption of self-laid water mains.

The consultation paper described the changes that the Water Act 2003 makes to the provisions of the Water Industry Act 1991 relating to the installation of new water mains, service pipes, sewers and lateral drains. The paper outlined our new powers to determine disputes and appeals relating to these issues. We set out our proposed approach and procedure for handling such disputes and appeals and invited comments.

This paper summarises the responses that we received and explains how we took account of them in the 'Process for handling disputes and appeals: Requisitioning of water mains and public sewers and/or lateral drains and adoption of self-laid mains'.

2. Summary

We received responses from over 30 stakeholders including water and sewerage companies, developers, self-lay organisations and customer/developer representatives. Three water companies did not comment in detail on the consultation paper, but wrote to endorse the response from Water UK.

In general, respondents were broadly supportive of our proposed approach and procedure. Most respondents reported the following:

- Our approach is reasonable
- That we had identified the necessary stages in the procedure.
- The proposed timescales for handling disputes were reasonable, although some companies suggested some flexibility might be necessary. Several representatives of one developer, however, considered the timescales too long and proposed an alternative timescale of two weeks.
- The general principle of Ofwat recovering its costs is reasonable. Recovery of costs may help deter frivolous complaints and encourage

parties to work together to resolve disputes, but it should not discourage the referral of genuine disputes.

- Ofwat should only recover the costs it incurs in obtaining external technical advice. These costs should be recovered from the losing party in a dispute. And in any particular case Ofwat should not recover costs where they amount to less than £500, and should limit recovery of costs from a single party to £5,000.

We have taken account of these comments in our guidance document.

We have summarised the responses to the particular questions we asked in section 3. A list of respondents is at annex A. We have placed all responses, unless marked confidential, in the Ofwat library.

3. Responses to questions

3.1 Do you consider that our approach is reasonable?

Generally most respondents considered our proposed approach to be reasonable.

One company noted that companies were entitled to recover the full reasonable costs of providing and connecting lateral drains and that the relevant deficit or commuted sum methods of payment did not apply to requisitioned lateral drains. We have clarified our explanation of charging provisions for lateral drains.

We proposed that when assessing the reasonable costs of the necessary work by companies we would expect the work to be carried out under a competitively let contract for labour and/or materials. One water company noted that some companies carry out such work 'in-house'. We have reconsidered our guidance on this point and now state that we would expect companies to be able to demonstrate that the costs of such work had been subject to market testing (whether by competitive tendering or appropriate comparisons).

We also stated that we consider it is usually appropriate for companies to apply overheads calculated on the basis of actual costs rather than a fixed percentage of the overall cost. Some companies commented that it is not always possible to apportion all overheads to specific jobs, for example costs relating to common support services. We have now added that it will be for companies to explain their approach to recovery of overheads where actual costs are not applied.

Several respondents commented that they would like to see a mechanism for publishing disputes and their resolution. We noted in our proposed procedure that we would publish determination decisions by placing them in our library three weeks after the decision. The library will provide copies of such determination decisions upon request. We will also consider publication via the Ofwat website.

3.2 Do you think that we need to include any further stages in the procedure?

We set out the following seven-stage process for us to consider and decide disputes and appeals.

Stage	Action	Time (weeks)
1	<p>(For requisitioning disputes) The person making an appeal will be expected to include the following in their appeal submission:-</p> <ul style="list-style-type: none"> • A full copy of their application to the water / water and sewerage company, including all supporting technical details. • A full copy of the company's offer of terms and conditions for the agreement. (The company must explain in such an offer its requirements for any network enhancement including provision of network analysis; and detail all charges, payments and security required.) • The terms and/or conditions they disagree with and an explanation of why they do so. • A copy of all correspondence between the parties. <p>(For self-lay) If applicable, a full copy of the water company's decision.</p> <ul style="list-style-type: none"> • In refusing the application, the water company must set out in detail the grounds for its refusal, with reference to its self-lay policy and the guidance issued by Ofwat and UKWIR. • In offering terms and conditions for the agreement, the water company must explain its requirements for the self-lay construction; requirements for any company network enhancement including provision of network analysis with supporting documents; and detail all charges, payments and security required. • The appellant must identify those terms and/or conditions they find unacceptable and explain why. 	
2	We will consider the dispute submission and write to the company for comment and/or further information.	2
3	We will require the company to provide their comments/further information.	2
4	We will advise both parties how we intend to proceed, including whether we intend to seek external advice and what, if any, charges we might make. We will allow two weeks for parties to respond.	4
5	Subject to clarifying facts, or seeking technical advice from a consultant engineer, we will prepare a draft report for determining the dispute within three weeks. This report will set out the facts of the case and the views of both parties and our provisional conclusions. For self-lay disputes where we provisionally conclude that the main and/or service pipe must be constructed for adoption other than on terms already offered by the company, we will also prepare and issue a draft agreement. The agreement will include a condition requiring the applicant to pay the costs referred to in section 51C(3) of WIA91 (that is network reinforcement costs and contributions towards earlier mains).	3
6	We will ask both parties to comment on the draft report documentation.	2
7	We will consider comments from both parties and prepare and issue the final decision.	3
8	We will publish determination decisions by placing them in our library three weeks after issue. If the parties wish, their names will be removed	

	from the published determinations.	
	Total	16

Most respondents considered that the proposed procedure was adequate and did not require any additional stages.

One water company suggested a preliminary assessment stage to filter out spurious appellants. But we consider that to add an additional stage for such assessment might lengthen the process unnecessarily for all disputes. We will, however, consider carefully at stages two and four whether the matter referred to us is a genuine dispute requiring determination by Ofwat.

Another company suggested the guidance could indicate the next course of action open to the appellant where the appellant is unhappy with the determination. We explain in the introduction to the guidance that determination decisions are final and binding on both parties, subject to judicial review. However, either party may refer the matter for judicial review.

3.3 Do you agree with our proposed timescales for handling disputes?

The majority of respondents considered our proposed timescales for handling disputes to be reasonable.

Some companies suggested that the timescales were very tight and, although generally achievable, some flexibility might be necessary if, for example, staff were on annual leave. One company noted it can take up to five years after completion of construction to settle all contractual claims.

Several representatives of one developer, on the other hand, considered that the timescales were too long and proposed an alternative timescale of two weeks. We believe that it is important to resolve disputes as quickly as possible. But it will not be possible to obtain and properly consider the information from both parties, and obtain technical advice where necessary, to determine disputes within such a short timescale.

We therefore consider the proposed timescales for handling disputes and appeals to be appropriate. As proposed in the consultation, we will review the timescales for dealing with cases in the light of our experience.

3.4 Do you agree, in principle, with the proposal for Ofwat to recover its costs incurred in handling disputes?

The majority of respondents considered the general principle of Ofwat recovering its costs to be reasonable. Some commented that recovery of costs might help deter frivolous complaints and encourage parties to resolve disputes between themselves. But respondents also stated that it should not discourage the referral of genuine disputes.

Several companies and one self-lay organisation suggested that we should not recover costs for an initial period, whilst the new statutory provisions 'bedded in'. Their views about the length of such a 'bedding in' period varied between six months and two years.

We have consulted on and have issued guidance in 'Competition in providing new water mains and service pipes' (March 2002) and 'Guidance on financing arrangements for self-lay and requisitioning agreements' (May 2004). In addition UKWIR will publish technical guidance in its 'Guide for self-laying of water mains' (June 2004). We therefore consider companies and developers have had the opportunity to consider issues arising from the new statutory provisions, though we do appreciate that initially more disputes may be referred as the new provisions are applied.

We do not consider it appropriate to apply a set time period during which we do not recover any of our costs for handling disputes. We consider that the anticipated expiry of that time period may lead to disputes being referred either frivolously or before the parties have attempted to resolve the matter between themselves. We will not recover costs in relation to any particular case where we have incurred those costs to enable us to consider novel issues and/or develop policy.

Several respondents (including companies, developers and consultants) noted that the winning party in a dispute should be able to recover its costs and compensation from the losing party. We have no powers to order one party in a dispute to pay some or all of the costs of the other party. This is explained in section 5 of our guidance.

3.5 What are your views on the proposals in section 5 for the levying and allocation of costs?

In our consultation paper we sought views on the types of costs that we should recover, the level of costs to be recovered and from whom the costs should be recovered.

In general, respondents considered that we should only recover the costs we incur for obtaining external technical advice, and that we should not recover our own staffing or overhead costs.

Most respondents agreed with our proposal that, in any particular case, we should not recover costs if they amount to less than £500, and that we should limit recovery of costs from a party to £5,000.

Where respondents expressed a view as to who should pay our costs, they stated that the losing party to the dispute should pay the costs, to encourage parties to work together to avoid the referral of a dispute. Two respondents noted that a dispute could involve multiple issues, where there is no clear losing party. In such circumstances they stated we should apportion the costs between the parties.

Four respondents commented that our intentions to recover costs in principle and/or in any particular case should be stated clearly and that costs should be transparent.

The legislation requires us to have regard to the conduct and means of the parties and any other relevant circumstances when deciding whether to recover costs in any particular dispute case. But as a general guide we consider that we are likely to recover costs from the losing party. Where there is not a clear 'winner' or 'loser', we are likely to apportion costs between the parties. In addition, we will:

- not recover costs and expenses in relation to any particular case if they amount to less than £500; and
- limit recovery of costs and expenses from a party in any particular case to £5,000.

Annex A

List of respondents

Companies

Anglian Water Services Ltd
Bournemouth & West Hampshire Water plc
Dee Valley Water plc
Dwr Cymru (Welsh Water)
Folkstone and Dover Water Services Ltd
Mid Kent Water plc
Northumbrian Water plc
Portsmouth Water plc
Severn Trent Water Ltd
South Staffordshire Water plc
Southern Water Ltd
South West Water Ltd
Sutton & East Surrey Water plc
Tendring Hundred Water Ltd
Thames Water Utilities Ltd
United Utilities plc
Wessex Water Services Ltd

Water UK

Developers

Annington Properties
Fortridge
Miller Homes
Taylor Woodrow

House Builders Federation

Self-lay organisations

Lanara Holdings
Mowlem Energy Ltd *

Others

B W Consulting Ltd
Chartered Institution of Water & Environmental Management (CIWEM)
David Heath Ltd
WaterVoice
WERM Ltd

All responses, except where provided in confidence (annotated * above) have been placed in the Ofwat library.